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**UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA**

Michael Diehl,

Plaintiff,

v.

County of Orange, Shane L Silsby, Director
OC Public Works Department in his official
capacity Sandra Hutchens, Sheriff of the
County of Orange, in her official capacity,

Defendants.

Case No. 8:17-cv-246

**EX PARTE APPLICATION
FOR TEMPORARY
RESTRAINING ORDER AND
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF APPLICATION
FOR TEMPORARY
RESTRAINING ORDER**

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23 Los Angeles, 2016
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25 Southern California, *Nowhere to Live: The Homeless Crisis in Orange*
 26 *County & How to End it* 2

27

28

1 Plaintiff Michael Diehl is homeless, lives in the Santa Ana River riverbed,
2 and is blind in one eye and has regular seizures resulting from having been shot in
3 the head in 2009. Because Defendants recently erected six foot high chain link
4 fences without open gates along one side of the river bed and near the Chapman
5 and Orangewood Avenue Bridges, Mr. Diehl is now trapped along with about 75 to
6 100 other homeless people by the fences and the steep and rocky embankments of
7 the river and the Santa Ana River itself.

8 Defendants have effectively made Mr. Diehl a prisoner, with no access to
9 food, water, or bathrooms. He reasonably fears for his health and safety.

10 Pursuant to Federal Rule of Civil Procedure 65, Petitioner respectfully
11 requests that the Court issue an emergency order:

- 12 (1) barring Defendants' from continuing to imprison people living in the homeless
13 encampment on the riverbed between the Orangewood and Chapman Avenue;
14 and
15 (2) ordering Defendant to permit people living in the homeless encampment on the
16 riverbed between the Orangewood and Chapman Avenue to leave the area
17 through one of the fences they have erected and, if they intend to evict them
18 from the area, permit them to return so that they can retrieve their belongings;
19 and
20 (3) ordering Defendants to notify people living in the homeless encampment on the
21 riverbed between the Orangewood and Chapman Avenue about where and how
22 he can safely leave the riverbed and return to retrieve his belonging

23 **NOTICE**

24 Plaintiff's counsel notified Defendants' counsel by letter attached to an e-
25 mail on Wednesday night, February 8 that if they did not voluntarily provide the
26 relief Plaintiff sets forth above, that Plaintiff would seek a Temporary Restraining
27 Order. Plaintiff's counsel followed up by calling Defendants' counsel on Thursday
28 February 9 in the morning and leaving a voice mail identifying himself, describing

1 briefly the situation at the riverbed and asking and directing them to call Plaintiff's
2 counsel at 714-450-3963. Defendants' counsel have not responded to Plaintiff's e-
3 mail or letter or telephoned Plaintiff's counsel. Hamme Decl. ¶¶4-6 and Exhibit 1.

4 **I. FACTS**

5 Plaintiff Michael Diehl, is a 46 year old man who has lived in Orange
6 County on and off for decades and continuously since 2005. Diehl Decl. ¶2. He
7 has a disability as a result of having been shot in the head while walking to a
8 convenience store in Tustin, California in 2009. *Id.* at ¶3.

9 Doctors were unable to remove the bullet from his head. *Id.* He lost his
10 right eye, has very poor depth perception, suffers from seizures, has poor balance
11 and gets dizzy easily as a result of the gun shot. *Id.* at ¶4. He has been taken to the
12 ER at least several dozen times as the result of the seizures. He take the generic
13 version of Tegretol twice a day to control the seizures, but recently they have
14 become more frequent. He has had three seizures in the last couple of months,
15 whereas in the past he went as long as eight months without a seizure. The
16 increase in my seizures corresponds with the increased policing in the riverbed and
17 the precariousness of his living situation. *Id.* at ¶5

18 After he was shot he lost everything, including his home and job and became
19 homeless. *Id.* at ¶3. He has lived in a tent on the Orange side of the Santa Ana
20 riverbed for the last 3 years with his dog Osiris between Chapman Ave. and
21 Oranewood Ave., closer to Oranewood. *Id.* at ¶3, 6.

22 For a number of years people who are homeless have lived in an
23 encampment along the river bank of the Santa Ana River between the Chapman
24 and Oranewood Avenue bridges in the City of Orange. Garrow Decl. ¶2, 7.

25 As the homeless problem in Orange County has continued to get worse, and
26 the County has failed to fund its own Ten-Year Plan to end homelessness in
27 Orange County, the number of people living in the encampment has swelled.
28 Denges Decl. ¶ 3. *See* ACLU Foundation of Southern California, *Nowhere to Live:*

1 *The Homeless Crisis in Orange County & How to End it*, Los Angeles, 2016
2 [https://www.aclusocal.org/sites/default/files/field_documents/nowhere-to-live-
4 acclu-socal-report.pdf](https://www.aclusocal.org/sites/default/files/field_documents/nowhere-to-live-
3 acclu-socal-report.pdf). In addition, law enforcement agents in various parts of the
5 County have told homeless people whom they interacted with that if they wanted
6 to avoid getting cited for violations like sleeping in public, they should move to the
7 river bank. Garrow Decl. ¶4-5. Currently, 50-100 people live in the encampment.
8 *Id.* at ¶7; Diehl ¶ 12. A wide variety of people live in the encampment, including
9 elderly people, people with physical and mental disabilities, and parents with
10 children. Garrow Decl. ¶ 21; Diehl Decl. ¶ 3-6, 12; Leonard Decl. ¶2 (blind in one
11 eye and only 40% vision in the other).

12 The encampment is on a flat, dirt path which is between the 57 freeway, on
13 the east side, and the Santa Ana River, on the west side. Garrow Decl. ¶8. On the
14 east side of the encampment there is a chain link fence made of metal that runs
15 along the 57 freeway. *Id.* at ¶ 9. The fence is about 5-6 feet in height, and it
16 topped by triangle-shaped fencing. *Id.* at ¶ 13. On the west side of the
17 encampment there is a fairly steep embankment that leads down to the riverbed
18 bottom. It is interrupted by a bike path. In most places that the embankment is at
19 about a 45 degree angle ranges from about 5 feet from bottom to top under the
20 bridges to about 30 feet from bottom to top in the area between the bridges. The
21 embankment is composed of large rocks or boulders, which have been covered
22 with cement. *Id.* at ¶ 10.

23 Until recently people living in the encampment would exit and enter the
24 encampment on the sidewalks of Chapman Avenue and Orangewood Avenue. *Id.*
25 at ¶ 11; Diehl Decl. ¶ 7. Over the past several days, employees from the OC Public
26 Works Department, working with personnel from the Orange County Sheriff's
27 Department, have sealed off those entry and exit paths off with chain link fences
28 across the river by the Chapman and Orangewood Avenue bridges. Diehl Decl. ¶
7; Garrow Decl. ¶ 13

1 In other places concrete barriers prevent people from leaving the riverbed.
2 As a result of the fencing on the east side of the embankment, the fences by the
3 Chapman and Orangewood Avenue bridges, and the concrete barriers, the only
4 way to leave the encampment is by climbing one of the fences, cutting a hole in the
5 fence, or trying to cross the river bed, and then scrambling up the steep rocky
6 embankment on the west side of the river bed. While there are a few gates at
7 various parts of the fencing around the encampment, they are either welded shut, or
8 kept locked. Diehl Decl. ¶¶ 6, 8; Garrow Decl. ¶¶ 19-20; Lim Decl. ¶3.

9 None of these options is safe or realistic for many people living in the
10 encampment. For example, there are elderly people and people with physical
11 disabilities including the Plaintiff, Mr. Diehl, who live in the encampment, who are
12 unable to climb a 5-6 foot chain link fence and have no bolt cutters to cut through
13 the fence. Diehl Decl. ¶¶ 8-10. They are afraid to cross the river bed, which not
14 only has water in it, but the bottom has become muddy with a consistency of quick
15 sand because of the recent heavy rains. *Id.* ¶ 11; Garrow Decl. ¶ 20. In addition,
16 sometimes a veritable flood of water comes down the river bed without warning,
17 apparently when the Army Corps of Engineers releases water backed up behind the
18 Prado Dam. Diehl Decl. ¶ 11; Garrow Decl. ¶ 14 .

19 Even if people were able to leave the encampment through a hole in a fence
20 that someone else had cut, they would not be able to bring their property with
21 them, given the difficulty getting through a hole in the fence – particularly for
22 elderly people and those with disabilities in the encampment -- and the amount of
23 personal property they possess. Diehl Decl. ¶ 10-11; Leonard Decl. 7; Lim Decl.
24 ¶8-9. And, they likely would not be able to return because of the fences, the
25 continuous effort of OC Public Works personnel to repair the holes, (Diehl Decl. ¶
26 10, Lim Decl. ¶3, 6), locked gates, and extreme difficulty of navigating the steep
27 embankment and crossing the river bed. Diehl Decl. ¶ 11; Garrow Decl. ¶¶ 14, 20.
28 County employees have said that they will destroy unattended property in the

1 encampment unless someone else nearby vouches that the property belongs to
2 someone and has not been abandoned. Denges Decl. ¶7.

3 Mr. Diehl and other people in the encampment have been provided no
4 information from the county about why the area has been sealed off and whether
5 there is a safe and accessible exit from the encampment. Diehl Decl. ¶ 13; Leonard
6 Decl. ¶ 5. An ACLU employee who was able to enter the encampment through a
7 hole in the fence discovered that the hole had been repaired when she tried to
8 leave. When she asked a worker from the OC Public Works Department who was
9 on the other side of the fence how she could leave, he merely shrugged his
10 shoulders but provided no answer. Lim Decl. ¶ 7. Nor has anyone from County
11 Counsel responded to the demand letter the ACLU sent to it describing its concerns
12 about the imprisonment and explaining that the ACLU would seek a TRO if the
13 situation was not addressed. Hamme Decl. ¶¶ 4-6.

14 The people trapped in the encampment do not have access to food or water.
15 Leonard Decl. ¶ 6. Being trapped also poses severe medical risks. For example,
16 one woman who lives in the encampment has epilepsy and is prone to seizures.
17 Lattanzi Decl. ¶3. She recently had a seizure in the encampment. *Id.* Someone
18 with her called 911, but when the emergency vehicles arrived they were unable to
19 get to her initially because the gate they would have entered to get into the
20 encampment was blocked by a large concrete barrier. Eventually, they went to
21 another gate and had to wait for county workers to unlock it. These obstructions
22 significantly delayed their being able to reach her and take her to the hospital. *Id.*
23 ¶¶ 4-8.

24 **II. ARGUMENT**

25 The standard for deciding requests for a temporary restraining order or
26 preliminary injunction relief are the same and are well established. “The proper
27 legal standard for preliminary injunctive relief requires a party to demonstrate ‘that
28 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in

1 the absence of preliminary relief, that the balance of equities tips in his favor, and
2 that an injunction is in the public interest.’ ” *Stormans, Inc. v. Selecky*, 586 F.3d
3 1109, 1127 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555
4 U.S. 7, 22 (2008).); *see also Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1172
5 (9th Cir. 2011) (“After *Winter*, ‘plaintiffs must establish that irreparable harm is
6 likely, not just possible, in order to obtain a preliminary injunction.’ ”); *Am.*
7 *Trucking Ass’n, Inc. v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. 2009). “A
8 preliminary injunction is appropriate when a plaintiff demonstrates ... that serious
9 questions going to the merits were raised and the balance of hardships tips sharply
10 in the plaintiff’s favor.” *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-
11 35 (9th Cir. 2011). As discussed below, the Court should issue an order staying
12 Petitioners’ removal and ordering their release from detention while the court
13 considers the merits of their petition for writ of habeas corpus.

14 **A. Temporary Restraining Order Permitting People in the**
15 **Encampment to Safely Leave the Encampment and Providing a**
16 **Reasonable Opportunity to Return to Retrieve Belongings is Warranted**

17 *1. Plaintiff is Likely to Succeed on the Merits of His Fourth*
18 *Amendment Claim.*

19 Plaintiff is likely to prevail on his Fourth Amendment claim. Defendants are
20 violating Mr. Diehl’s Fourth Amendment rights by continuing to subject him to an
21 unreasonable seizure of his personal liberty because he is unable to leave the Santa
22 Ana Riverbed due to the barriers put up by Defendants. Diehl Decl. ¶¶7-9. “The
23 right of the people to be secure in their persons, houses, papers, and effects, against
24 unreasonable searches and seizures, shall not be violated...” U.S. CONST. AMEND.
25 IV. “No right is held more sacred, or is more carefully guarded, by the common
26 law, than the right of every individual to the possession and control of his own
27 person, free from all restraint or interference of others, unless by clear and
28 unquestionable authority of law.” *Terry v. Ohio*, 392 U.S. 1, 9, 88 S. Ct. 1868,

1 1873, 20 L. Ed. 2d 889 (1968), *quoting*, *Union Pac. R. Co. v. Botsford*, 141 U.S.
2 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891). Defendants have
3 unquestionably seized Plaintiff and all other individuals unable to leave the
4 Riverbed as the result of Defendants' intentional actions and they have done so
5 unreasonably, without the authority of law.

6 Plaintiff's freedom of movement has been restrained by Defendants through
7 physical barriers erected while they knew that Plaintiff and many others were
8 inside the barriers and would be unable to leave. Diehl Decl. ¶¶7-9; Esther Decl.
9 ¶¶5-6. "A person is seized by the police and thus entitled to challenge the
10 government's action under the Fourth Amendment when the officer by means of
11 physical force or show of authority terminates or restrains his freedom of
12 movement through means intentionally applied." *Nelson v. City of Davis*, 685 F.3d
13 867, 875 (9th Cir. 2012), *quoting*, *Brendlin v. California*, 551 U.S. 249, 254, 127
14 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (internal quotation marks and citations
15 omitted) (emphasis omitted). Defendants have used physical force against Plaintiff
16 be erecting six-foot, chain link fences that prevent Plaintiff from being able to exit
17 the Riverbed.

18 In *Brower v. Cty. of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628
19 (1989), the Supreme Court found that a road block could constitute a seizure
20 because the government caused Brower's freedom of movement to be terminated
21 "*through means intentionally applied.*" *Brower*, 489 U.S. at 597 (emphasis in
22 original). Here, Defendants have erected physical barriers in such a way that it
23 terminates Plaintiff's freedom of movement – they have essentially encircled him
24 in roadblocks – and they have done so with the intention of restricting his
25 movement. *Brower* reversed the Ninth Circuit Court of Appeals, which had
26 concluded that no seizure had occurred when Brower ran into a police roadblock
27 because he had the opportunity to stop the car. Justice Scalia explained the
28 reversal by reference to *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85

1 L.Ed.2d 1 (1985), in which the Court found that a fatal shooting by a police officer
2 constitutes a “seizure” under the Fourth Amendment. “Brower's independent
3 decision to continue the chase can no more eliminate respondents' responsibility
4 for the termination of his movement effected by the roadblock than Garner's
5 independent decision to flee eliminated the Memphis police officer's responsibility
6 for the termination of his movement effected by the bullet.” *Brower*, 489 U.S. at
7 595. Similarly, Plaintiff’s choice of where to live and to remain in the Riverbed as
8 the fences went up, do not eliminate Defendants’ “responsibility for the
9 termination of his movement effected by” the fences. *Id.* Defendants’ actions have
10 clearly and intentionally restricted Plaintiff’s freedom of movement and therefore
11 constitute a seizure under the Fourth Amendment.

12 Defendants’ restriction of Plaintiff’s movement is unreasonable because the
13 manner in which they are detaining Plaintiff is unreasonable under the Fourth
14 Amendment. It is excessive – and therefore unreasonable – to trap Plaintiff and
15 others outside, without safe access to food, water, or medical attention. *LaLonde v.*
16 *Cty. of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000). In *Kassab v. San Diego*
17 *Police Dep’t*, 453 Fed. App’x 747, 748 (9th Cir. 2011), the Ninth Circuit found it
18 unreasonably excessive for police to hold an arrestee in their police car for more
19 than four hours while restrained and in hot weather. *See also, Burchett v. Kiefer*,
20 310 F.3d 937, 945 (6th Cir.2002) (holding arrestee in police vehicle for three hours
21 in 90 degree heat was unreasonable).¹ Defendants are detaining Plaintiff on the
22 side of a riverbed by means of physical barriers. Plaintiff is unable to freely leave
23 to get food, water, or other essentials. Diehl Decl. ¶¶7-9; *see also* Leonard Decl. 6.
24 Should Plaintiff need medical attention for his seizures, he would not be able to

26 ¹ In the Eighth Amendment context, the Supreme Court found the tying of a
27 prisoner to hitching post and exposing him to sun for seven hours unreasonable
28 because excessive. *Hope v. Pelzer*, 536 U.S. 730, 738, 122 S.Ct. 2508, 153
L.Ed.2d 666 (2002).

1 leave and it is unclear if paramedics would be able to get to him in a timely
2 fashion. Certainly their access would be severely curtailed by the barriers
3 Defendants have erected. Diehl Decl. ¶¶7-9; Lattanzi Decl. ¶4. By no stretch of
4 the imagination does Plaintiff's detention constitute a reasonable seizure as
5 contemplated by the Fourth Amendment.

6 Defendants' seizure of Plaintiff is also unreasonable because it constitutes a
7 *de facto* arrest without the required procedures of bringing him promptly before a
8 judge for a probable cause hearing. *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S.Ct.
9 854, 863 43 L.Ed.2d 54 (1975). In other words, even if Defendants have probable
10 cause to arrest Plaintiff that does not mean they can seize him in any manner they
11 choose for any length of time and without the constitutional protections required in
12 the criminal process. An arrest occurs when an individual does not feel free to
13 leave. *See, generally, United State v. Drayton*, 536 U.S. 194, 202, 122 S.Ct. 2105,
14 2111, 152 L.Ed.2d 242 (2002). Plaintiff has been in the Riverbed for over 24
15 hours and is not free to walk away because of the barriers erected by Defendants.
16 The length of time alone would make the seizure unreasonable², but even more
17 troubling is the fact that this *de facto* arrest has occurred with no corresponding
18 actions on the part of Defendants to bring Plaintiff and others before a judge for
19 arraignment or trial. They have not even been charged with any crimes.

20 Individuals arrested without a warrant, as in Plaintiff's case, "must promptly be
21 brought before a neutral magistrate for a judicial determination of probable cause."
22 *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 53, 111 S. Ct. 1661, 1668, 114 L.

23
24 ² *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 1575, 84 L. Ed. 2d
25 605 (1985) ("In assessing whether a detention is too long in duration to be justified
26 as an investigative stop, we consider it appropriate to examine whether the police
27 diligently pursued a means of investigation that was likely to confirm or dispel
28 their suspicions quickly, during which time it was necessary to detain the
defendant.") *See, Michigan v. Summers*, 452 U.S. 692, 701, n. 14, 101 S.Ct. 2587,
2594, n. 14 (quoting 3 W. LaFave, *Search and Seizure* § 9.2, p. 40 (1978).

1 Ed. 2d 49 (1991). *See also, Gerstein*, 420 U.S., at 114, 95 S.Ct., at 863.
2 “Promptly” generally means within 48 hours. *Cty. of Riverside*, 500 U.S., at 56,
3 111 S.Ct., at 1670. Defendants are extremely close to, if they have not already,
4 exceeded 48 hours since the last fence completed encircled the encampment by the
5 Riverbed. Diehl Decl. ¶ 7. But even if Defendants were able to provide Plaintiff
6 with a probable cause hearing within 48 hours, they would still have violated
7 Plaintiff’s Fourth Amendment rights because any such hearing has been
8 unreasonably delayed because they have taken no administrative steps necessary to
9 get him in front of a magistrate judge, such as booking and charging him, since
10 erecting the fences. *Cty. of Riverside*, 500 U.S. at 56-57, 111 S.Ct. at 1670 (“This
11 is not to say that the probable cause determination in a particular case passes
12 constitutional muster simply because it is provided within 48 hours. Such a hearing
13 may nonetheless violate *Gerstein* if the arrested individual can prove that his or her
14 probable cause determination was delayed unreasonably. Examples of
15 unreasonable delay are delays for the purpose of gathering additional evidence to
16 justify the arrest, a delay motivated by ill will against the arrested individual, or
17 delay for delay’s sake.”). Defendants’ actions constitute a *de facto* arrest of
18 Plaintiff, but without the required next steps of bringing Plaintiff before a judge for
19 a probable cause determination. This arrest is unlawful and must be stopped by
20 providing Plaintiff with a clear, and safe exit point from the Riverbed.

21 Defendants are violating the Fourth Amendment by unreasonably restricting
22 Plaintiff’s liberty. They are doing so in a way that is unreasonably dangerous and
23 with no judicial review. Defendants must immediately provide a safe exit to
24 Plaintiff and allow him the opportunity move all of his personal property out of the
25 Riverbed. And, if they intend to evict him from the riverbed, they must allow him
26 not only to leave safely but to have a reasonable opportunity to remove his tent and
27 other personal property, which is all he owns in the world. Diehl Decl. ¶10
28

1 2. *Plaintiff is Likely to Succeed on the Merits of His Due Process*
2 *Claim.*

3 Plaintiff are likely to prevail on his Fourteenth Amendment due process
4 claim because Defendants have severely restricted their liberty without providing
5 them any process. Freedom from confinement is a right so basic to liberty, that
6 due process must be afforded in any state action which threatens it – regardless of
7 the state’s motive. *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (“freedom ‘from
8 bodily restraint’ lies ‘at the core of the liberty protected by the Due Process
9 Clause.’”) (internal citation omitted). Fourteenth Amendment scrutiny is not
10 limited to state exercises of police powers, or even to actions intended to punish
11 those who are confined. Due process is required even when states “confine”
12 pursuant to civil laws, designed for non-punitive or even benevolent purposes, like
13 protecting the confined person and/or the public. *See, e.g., Turner*, 564 U.S. 431
14 (civil contempt proceedings re: child support); *Addington v. Texas*, 441 U.S. 418
15 (1979) (civil commitment of mentally ill); *Foucha v. Louisiana*, 504 U.S. 71 (1992)
16 and *Jones v. United States*, 463 U.S. 354 (1983) (commitment of insanity defense
17 acquittee post acquittal); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (civil
18 commitment of sexual predator).

19 The Supreme Court has made clear in each of these cases that process is due
20 before any state confinement can pass constitutional muster. Constitutionally
21 adequate procedures must be in place to test the factual basis for confinement.
22 *Foucha*, 504 U.S. at 79. The factual basis must be established by a burden of proof
23 equal to or exceeding a constitutional minimum. *See Addington*, 441 U.S. at 427
24 (civil “preponderance of evidence” standard insufficient in commitment
25 proceedings). And both the state’s interests and whether confinement is required
26 to serve them are part of the 14th Amendment analysis. *See Jones*, 463 U.S. at 361
27 (“constitutionally adequate” purpose required for non-criminal detention); *Foucha*,
28 504 U.S. at 81 (striking confinement scheme “not carefully limited” to serve

1 legitimate ends).

2 As discussed above, there can be no constitutionally sound reason for the
3 County to “trap” Diehl and other river residents. No procedures were available to
4 discuss, much less decide by any standard of proof, that they could be corralled by
5 a six-foot fence. That it was erected for a public works project does not shield the
6 action from due process scrutiny, under the Supreme Court’s long standing
7 authority.

8 3. *Plaintiff is Likely to Succeed on the Merits of His State*
9 *Common Law False Imprisonment Claim.*

10 Defendants have falsely imprisoned Plaintiff and many dozens more in the
11 Santa Ana Riverbed by erecting six-foot, chain link fences in such a way that there
12 is no safe or viable exit. False imprisonment occurs when there is “(1) the
13 nonconsensual, intentional confinement of a person, (2) without lawful privilege,
14 and (3) for an appreciable period of time, however brief.” *Robles v. Agreserves,*
15 *Inc.*, 158 F. Supp. 3d 952, 975 (E.D. Cal. 2016). *Accord, Young v. County of Los*
16 *Angeles*, 655 F.3d 1156, 1169 (9th Cir.2011); *Shoyoye v. County of Los Angeles*,
17 203 Cal.App.4th 947, 962, 137 Cal.Rptr.3d 839 (2012); *see also Fermino v. Fedco,*
18 *Inc.*, 7 Cal.4th 701, 715, 30 Cal.Rptr.2d 18, 872 P.2d 559 (1994). Defendants’
19 actions meet all three of these elements, and thus Plaintiffs are likely to prevail on
20 the merits of their false imprisonment claim.

21 Defendants have intentionally, and without consent, confined Plaintiff and
22 dozens of other disabled and vulnerable individuals experiencing homelessness
23 who are taking shelter on the banks of the Santa Ana Riverbed. Restraint or
24 confinement “may be effectuated by means of physical force, threat of force or of
25 arrest, *confinement by physical barriers*, or by means of any other form of
26 unreasonable duress.” *Robles*, 158 F. Supp. 3d at 975 (quoting *Fermino*, 7 Cal.4th
27 at 715, 30 Cal.Rptr.2d 18, 872 P.2d 559 (citations omitted) (emphasis added)). *See*
28 *also Scofield v. Critical Air Medicine, Inc.*, 45 Cal.App.4th 990, 1001, 52

1 Cal.Rptr.2d 915 (1996). Over the course of several weeks, Defendants have
2 erected six-foot high chain link fences along the border between the Riverbed and
3 the road in the City of Orange. Declaration of John Leonard ¶ 3; Declaration of
4 Michael Diehl ¶¶ 6, 7. They have also erected fences at points where various
5 bridges cross the River, a main entry and exit point for the individuals living in the
6 Riverbed. Diehl Decl. ¶ 7; Declaration of Eve Garrow ¶ 12. While there are
7 sometimes gates placed at these points – presumably to allow some amount of
8 access to the Riverbed – these gates are locked. Diehl Decl. ¶ 6. Sometime on
9 Wednesday, February 8, 2017, Defendants completed erecting fences at the
10 Chapman Avenue Bridge, thereby completely enclosing a large stretch,
11 approximately ¼ mile long, of the Riverbed from at least Orangewood Avenue to
12 Chapman Avenue on the City of Orange side of the Riverbed. Diehl Decl. ¶ 7;
13 Garrow Decl. ¶ 15; Declaration of Melanie Payne Decl. ¶ 3. The fences were
14 erected while people were still in the Riverbed with their families and property and
15 Defendants were aware of this because they were erecting the fences only feet
16 away from where people were living. Garrow Decl. ¶ 15. When one person asked
17 a County worker on the outside of the fence how she could get out, the response
18 was a “shrug” and the worker walked away leaving her trapped. Declaration of
19 Esther Lim Decl. ¶ 6. The only exits that currently exist are (1) scaling the six-foot
20 high fence and risking serious injury, (2) cutting a hole in the fence and risking
21 injury or arrest for destruction of public property, or (3) scrambling down a steep
22 and rocky embankment, crossing the Santa Ana River, and climbing up another
23 dangerous embankment to the Anaheim side of the Riverbed. Diehl Decl. ¶ 8;
24 Payne Decl. ¶ 4; Leonard Decl. ¶¶ 4, 6. For those individuals with disabilities this
25 is impossible. When the Santa Ana River is high, such as when the U.S. Army
26 Corps of Engineers opens the Prado Dam, it is impossible for anyone to exit by
27 crossing the River. Diehl Decl. ¶ 11; Garrow Decl. ¶ 14. Defendant’s actions are
28 intentional, without the consent of Plaintiff, and confine Plaintiff, by means of

1 physical barriers, to a small area where he, and others, cannot leave and has limited
2 access to food, water, medication, or other essential needs. Diehl Decl. ¶ 10, 13;
3 Leonard Decl. ¶ 6.

4 Defendants' actions constitute confinement even if there are occasional,
5 temporary openings in the fence because many trapped in the Riverbed are not
6 aware of these openings and, if they are, they either cannot leave due to a physical
7 disability or chose not to leave because they are afraid they will not be able to
8 retrieve their property. Defendants have confined Plaintiff and others through a
9 combination of "physical barriers" and "unreasonable duress". *Robles*, 158 F.
10 Supp. 3d at 975. False imprisonment can be accomplished through means other
11 than physical force. *Molko v. Holy Spirit Assn.*, 46 Cal.3d 1092, 1123, 252
12 Cal.Rptr. 122, 762 P.2d 46 (1988) (superseded by statute on other grounds). In
13 *Molko*, one of the plaintiffs claimed she was falsely imprisoned by the Unification
14 Church. Although she was not physically restrained, her imprisonment came from
15 "from the harm she came to believe would result if she left the community." *Molko*
16 46 Cal.3d at 1123. While the California Supreme Court found her claim could not
17 stand because it implicated the Church's constitutionally protected religious
18 speech, they did affirm that "false imprisonment may be 'effected by ... fraud or
19 deceit [.]'" *Id.* See also, *Scofield v. Critical Air Med., Inc.*, 45 Cal. App. 4th 990,
20 1001-02, 52 Cal. Rptr. 2d 915, 920 (1996), *as modified on denial of reh'g* (June
21 19, 1996). Here, Plaintiffs and others are both physically restrained by the barriers
22 and afraid of the harm that would result if they try to leave through any small holes
23 that might exist. Leonard Decl. ¶ 4, 7. Some who have left the Riverbed have lost
24 their property. Garrow Decl. ¶ 16; Payne Decl. ¶ 3. Others are afraid of physical
25 harm or are too disabled to leave. Diehl Decl. ¶¶ 9-12. Such conditions constitute
26 confinement, even if there are occasional openings in the physical barriers.
27 Defendants must communicate with Plaintiff and create a clear, safe, and
28 permanent exit point for those in the Riverbed to be able to exit with their property.

1 Defendants' physical confinement of Plaintiff is without lawful privilege.
2 *Molko*, 46 Cal. 3d at 1123. *See also*, *Collins v. Los Angeles Cty.*, 241 Cal. App. 2d
3 451, 459–60 (1966) (“[False imprisonment] requires some restraint of the person
4 and that he be deprived of his liberty or compelled to stay where he does not want
5 to remain, or compelled to go where he does not wish to go; and that the person be
6 restrained of his liberty without sufficient complaint or authority.”) There is no
7 legal authority for Defendants to confine approximately one hundred individuals
8 for over 24 hours in an outdoor area. As discussed in the Fourth Amendment
9 Section above, Defendants have no lawful basis for Plaintiff’s detention. The
10 manner in which he is being detained is unreasonable. Even if Plaintiff concedes
11 there may be probable cause to suspect he has violated the law, the length of time
12 he has been held without a probable cause hearing makes his confinement – his *de*
13 *facto* arrest - unlawful. *See, Fourth Amendment Section, supra*. Plaintiff is aware
14 of no arrests or citations given to individuals trapped inside the fences. Indeed,
15 Defendants are not even speaking with Plaintiff or anyone else counsel if aware of,
16 except to occasionally threaten arrest if a person does not leave the Riverbed, while
17 simultaneously continuing with the erection and repair of fences confining
18 Plaintiff. Diehl Decl. ¶ 13; Leonard Decl. ¶ 5; Payne Decl. ¶¶ 5, 6; Hamme Decl. ¶
19 4-6. There is no lawful basis Plaintiff can find for fencing people in for over 24
20 hours and preventing them from being able to leave without access to food, water,
21 or medical care.

22 Defendants have confined Plaintiff for a period of at least 24 hours. Diehl
23 Decl. ¶ 7; Garrow Decl. ¶ 12, 15. This is certainly “an appreciable period of time,
24 however brief.” *Alterauge v. Los Angeles Turf Club*, 97 Cal.App.2d 735, 736, 218
25 P.2d 802 (1950). (holding confinement of 15 minutes sufficient to meet third
26 element of false imprisonment). *See also*, *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701,
27 715, 872 P.2d 559, 567 (1994). Confinement does not need to be permanent for it
28 to constitute false imprisonment. Even if gates are sometimes opened to let in OC

1 Public Works trucks, there is still false imprisonment because the confinement
2 does not have to be permanent to be illegal. Given the size of the encampment, the
3 age and infirmity of some of the people in the area, opening the gate for a short
4 period does not guarantee sufficient exit because they may not know it is open, or
5 may not be able to get to it with their stuff before it is shut again. Plaintiff and
6 other similarly situated individuals who are unable to leave the encampment are at
7 risk of physical harm. For example, one woman who suffers from epilepsy had a
8 seizure while in the encampment and it took paramedics an additional 10 minutes
9 to reach her due to the fences. Declaration of Raymond Lattanzi. In such
10 circumstances, any length of confinement within the encampment constitutes false
11 imprisonment.

12 Particularly galling is the fact that officers from various police departments
13 from around Orange County, have previously told homeless individuals they
14 encountered in areas of their jurisdiction to move to the Santa Ana Riverbed if they
15 wanted to avoid citation or arrest. Garrow Decl. ¶ 4, 5. First Defendants and other
16 law enforcement agencies direct individuals to the Santa Ana Riverbed, then they
17 falsely imprison them by literally building fences around them that make it
18 impossible for them to leave. Finally, they threaten with arrest those who do not
19 leave, even though Defendants have made it physically impossible for them to do
20 so. Payne Decl. ¶ 6. Such a Kafkaesque system cannot stand and is not lawful.
21 Defendants must immediately provide a safe and secure exit for those currently
22 residing in the Riverbed and allow them time to properly remove their property.

23 **B. A TRO is Otherwise Warranted**

24 1. *Plaintiff and Others Living in the Riverbed are Likely to Suffer*
25 *Irreparable Injury.*

26 Petitioner is likely to suffer irreparable harm in the absence of a temporary
27 injunction. Indeed, the case law is clear that deprivation of constitutional rights,
28 including the right to be free from unreasonable seizure, or deprivation of liberty

1 without due process, “unquestionably constitutes irreparably injury.” *Melendres v.*
2 *Arpaio*, 695 F. 3d 990, 1002 (9th Cir. 2012) (physical detention in violation of 4th
3 Amendment) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Rodriguez v.*
4 *Robbins*, 715 F. 3d 1127, 1145-46 (9th Cir. 2013) (prolonged immigration
5 detention without bond proceedings implicated freedom from restraint “at core” of
6 liberty). In addition, by fencing Mr. Diehl and others homeless people on the
7 riverbed and denying the ability to leave, Defendants are restricting their access to
8 denying them entirely of access to food, water, and medical care. Deprivation of
9 life’s necessities constitutes irreparable harm, as does the psychological trauma
10 that may result. See *Bowen v. City of N.Y.*, 476 U.S. 467 (1986) (discussing
11 irreparable injury from loss of benefits and resulting trauma); *Lopez v. Heckler*,
12 572 F. Supp. 26, 30 (C.D. Cal. 1983) (finding irreparable constitutional injury from
13 deprivation of life’s necessities) (aff’d in part, rev’d in part on other grounds in
14 *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. 1984)); *M.R. v. Dreyfus*, 697 F.3d 706,
15 732 (9th Cir. 2012), and cases cited therein (irreparable injury in reduced access to
16 home health care services such as feeding and cleaning intimately related to mental
17 and physical health).

18 2. *The Balance of Equities Tips Clearly in the Plaintiff’s Favor*

19 Entry of an injunction in the Plaintiff’s favor would not cause the Defendant
20 any serious harm. The scale tips strongly in Plaintiff’s direction when balancing
21 the equities. None of Defendant’s interests that could be at play here could
22 approach Plaintiff’s interest in physical freedom and survival. See, e.g., *Rubinstein*
23 *v. Brownell*, 206 F.2d 449, 456 (D.C. Cir. 1953) (finding “no occasion to balance
24 equities” where nothing “could outweigh irreparable loss of personal liberty”
25 which would follow from confinement following arrest.). Completely fencing in
26 Plaintiff and other river residents cannot be justified by any need of a public works
27 department. If Defendants need to remove some people from the area for their
28 safety or to do a public works project, there are safe and legal means to do so;

1 fencing them into the area and trapping them there achieves no good purpose.

2 *3. This Injunction is in the Public Interest*

3 A human trap offends the most basic precepts of a civilized society and the
4 public interest can only be served by providing Plaintiff and others living there
5 with safe egress from the riverbed. While the public may have an interest in
6 restricting access to dangerous areas to facilitate public works projects, those
7 interests could only be served if the area is first safely cleared of public who are
8 living there.

9 **CONCLUSION**

10 Plaintiff respectfully requests that this Court grant the Temporary
11 Restraining Order and issue an Order to Show Cause re Preliminary Injunction

12
13 Dated: February 10, 2017

ACLU FOUNDATION OF SOUTHERN
CALIFORNIA

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by: s/ Peter Eliasberg

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